ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of Section 25 of the	)	
Cable Television Consumer Protection	)	MM Docket No. 93-25
and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

COMMENTS OF TEMPO SATELLITE, INC.

TEMPO Satellite, Inc.

Richard E. Wiley
Todd M. Stansbury
of
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

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SUMMARY

Throughout the history of DBS, the Commission has consistently applied a policy of maximizing public benefits by minimizing regulatory burdens on providers. In this way, DBS operators can flexibly and efficiently respond to rapidly evolving consumer demands with new and innovative services. Indeed, the successful introduction of DBS services in the past few years vindicates this historical approach. Although DBS has become a reality, however, one critical fact remains unchanged since the Commission began this proceeding in 1993: the DBS industry remains in its infancy. Consequently, in adopting rules to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, the Commission should maintain its traditional approach of imposing the least burdensome obligations necessary to fulfill public interest objectives. The Commission, moreover, should facilitate efforts currently underway by DBS representatives to create an industry-wide solution that would promote public service benefits intended by the statute at minimal cost.

As the operator of an eleven transponder system, TEMPO is concerned that it not be unfairly prejudiced in the marketplace by onerous regulations that could be absorbed more easily by larger competitors. Thus, a regulatory system that facilitates the introduction of new public interest services while minimizing the impact on smaller systems would further the Commission's goal of promoting robust competition and maximizing consumer benefits.

In particular, TEMPO submits that the public interest obligations of the statute would be best served by requiring DBS providers, especially those with limited capacity, to reserve no more than four percent of their video capacity for noncommercial educational and informational programming. The four percent set-aside for each provider should be calculated by determining the number of channels of non-duplicated full-motion video programming actually provided by

that operator to subscribers as of a date certain, which would be updated every two years. The Commission, as it proposed, should then use a sliding scale to determine the amount of video capacity to be set-aside. This simple approach would accommodate the dynamic nature of program offerings distributed through varying compression ratios over time, and provide DBS operators with needed flexibility to respond quickly to shifting consumer demands.

The Commission's rules should be designed to encourage programmers of all types to produce quality noncommercial educational and informational programming. DBS providers, therefore, should not be required to dedicate specific channels to provide qualifying noncommercial programming. Rather, the Commission should define a specific annual hour requirement by multiplying the number of channels to be set-aside by 24 hours per day by 365 days a year. These services could then be creatively packaged and marketed to enhance exposure throughout the operator's channels and allow providers to differentiate their program offerings.

To further maximize diversity and promote the creation of new educational and informational programming, the Commission should broadly construe the classes of programmers and the types of programming a DBS provider may rely upon to fulfill its statutory obligation. Because Section 25 does not specifically define "national educational program supplier," but merely provides illustrative examples of certain qualifying entities, the Commission has the authority to interpret the statutory language in a manner that best furthers the intent of Congress. Opening the door to a variety of program producers would promote competition, and thereby encourage the programming industry to create a diverse mix of high quality noncommercial educational and informational programming.

TEMPO submits that, to the extent a programmer pays for capacity to distribute programming in satisfaction of the set-aside, the Commission should set the benchmark for reasonable rates at the maximum permissible 50 percent of direct costs and narrowly construe excluded expenditures. This construction would further the statutory mandate without jeopardizing the continued growth and development of DBS. Setting reasonable costs at a level lower than 50 percent, moreover, would have a disproportionate impact on operators with limited capacity, which would have to amortize such costs over fewer satellite assets than larger systems.

In adopting political advertising obligations for DBS service, the Commission should carefully tailor its existing rules and policies to account for the differences between a national multichannel DBS service, on the one hand, and traditional broadcast stations and cable systems, on the other. TEMPO agrees with the Commission that it should apply its "long-standing policy" of relying upon the good faith judgments of licensees to provide reasonable access to federal candidates and determining compliance on a case-by-case basis. To take into account the fact that DBS is a national service, access rules should only apply to candidates for the offices of President and Vice President. DBS providers, moreover, should be allowed the flexibility to provide political programming in a manner that would be most attractive to viewers. Accordingly, a DBS provider should not be required to make all video channels under its control available to federal candidates, and should be able to accommodate its access obligations by designating one or more channels for use by national candidates.

In applying equal opportunity rules and policies to DBS, the Commission should follow the model it has applied to cable operators. Thus, DBS operators should be required to ensure only that the channels utilized have comparable audience size. This established approach would

allow a DBS provider to more efficiently and effectively provide its subscribers with access to opposing political messages.

Finally, TEMPO supports the Commission's conclusion that further public interest regulations should not be considered given the significant obligations imposed pursuant to Section 25 of the Cable Act, the nascent stage of the DBS industry, and the Commission's successful implementation of a flexible regulatory approach to foster the development of this service. TEMPO also submits that local service obligations on a national DBS service are inappropriate. Unlike cable systems and broadcast stations, which are designed to provide service to individual communities, existing DBS providers do not have the vast channel capacity or resources that would be necessary to deliver local service to markets throughout the country. In addition, a requirement that existing systems dedicate full-CONUS resources to deliver local service would result in extremely inefficient spectrum utilization.

In short, continuation of the Commission's traditional regulatory approach of minimizing the regulatory burdens on new and emerging providers, especially on systems with limited capacity, will encourage DBS competitors and program producers to develop new and valuable program services. Thus, the Commission will be able to achieve its goals of promoting competition in the MVPD marketplace and enhancing public service benefits to consumers at minimal cost.

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COMMENTS OF TEMPO SATELLITE, INC.

TEMPO Satellite, Inc. ("TEMPO"), by its attorneys, hereby submits its comments in the above-referenced proceeding. TEMPO is authorized to construct an eleven-channel direct broadcast satellite ("DBS") system at 119° W.L. and an eleven channel system at 166° W.L.[1] On March 8, 1997, TEMPO launched its first state-of-the-art DBS satellite at 119° W.L., and expects to commence service in the near future.

TEMPO is committed to ensuring that U.S. consumers benefit from the public interest objectives of this proceeding. TEMPO is concerned, however, that as the operator of an eleven transponder system, it not be unfairly prejudiced in the marketplace as a result of new regulatory obligations which may be more readily absorbed by larger competitors. In addition, the DBS industry remains in its infancy, as demonstrated by TEMPO's recent launch. Accordingly, any new rules should maintain the Commission's traditional approach to the regulation of DBS by imposing the least burdensome obligations necessary to fulfill the

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[1] TEMPO Satellite, Inc., 7 FCC Rcd 2728 (1992). TEMPO is a wholly-owned subsidiary of TCI Satellite Entertainment, Inc., a publicly-traded corporation, which was created in a spin off of certain assets of Tele-Communications, Inc. on December 4, 1996.

public interest objectives of this proceeding. In this way, the Commission will promote the opportunity for all DBS systems, including those with limited capacity, to maximize substantial public benefits by becoming effective competitors.

I. DBS IS STILL A NEW AND EVOLVING COMPETITOR IN THE VIDEO MARKETPLACE, AND ACCORDINGLY, THE COMMISSION SHOULD FOSTER PUBLIC BENEFITS BY CONTINUING ITS HISTORICAL APPROACH OF MINIMAL REGULATION

By Public Notice dated January 31, 1997, the Commission called for interested parties to update and refresh the record in this proceeding, which the Commission began in 1993 to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act").[2] Pursuant to Section 25(b) of the 1992 Cable Act, the Commission must adopt rules requiring certain satellite direct-to-home ("DTH") providers to reserve four to seven percent of their channel capacity for noncommercial educational and informational programming. In addition, Section 25(a) requires the FCC to adopt rules imposing reasonable access and equal opportunity requirements for federal political candidates. Congress also requested the Commission to examine the ways in which DBS may fulfill the Commission's goal of service to local communities.

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[2] Public Notice No. 72078, FCC 97-24 (Jan. 31, 1997). See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Service Obligations, 8 FCC Rcd 1589 (1993) ("NPRM"). After receiving initial comments in 1993, the FCC took no further action on the NPRM pending a court challenge to the constitutionality of Section 25. The FCC revived this proceeding in response to a recent Court of Appeals decision upholding the legality of Section 25. See Comments Sought in DBS Public Interest Rulemaking, Public Notice, MM Docket No. 93-25, FCC 97-24 (rel. Jan. 31, 1994).

In adopting rules to implement Section 25, the Commission should acknowledge the success of its historical minimalist approach to DBS regulation, which has resulted in the recent creation of an entirely new industry. Given the early stage of DBS competition, the need for a flexible regulatory approach is even more critical today to ensure that this new class of video providers can adapt to a rapidly evolving marketplace. In this way, the Commission can foster its goal of enhancing consumer benefits through effective competition in the multichannel video programming distribution ("MVPD") marketplace.

The bulk of the initial comments in this proceeding forcefully advocated a flexible regulatory approach that generates public benefits through avoiding unnecessary burdens on the developing DBS industry. This approach is equally valid today. Since 1993, DIRECTV, Inc., United States Satellite Broadcasting Company, Inc. ("USSB"), and EchoStar Satellite Corporation ("EchoStar") have begun operations, but numerous other DBS permittees -- MCI Telecommunications Corporation ("MCI"), Continental Satellite Corporation, Dominion Video Satellite, Inc., and Direct Broadcasting Satellite Corporation (which is now owned by EchoStar) -- have yet to initiate service. In addition, TEMPO only recently launched its first satellite. Thus, a critical fact remains unchanged since the Commission initiated this proceeding: while DBS is now a reality, the service is still in its infancy.

Therefore, the Commission should approach the implementation of Section 25 with the same caution it expressed in the original 1993 NPRM, and which has guided its policies throughout the history of DBS regulation. A flexible regime that imposes only minimal burdens required by statute will further the public interest by ensuring that DBS providers, large and small, can become effective competitors in the MVPD marketplace. In contrast, the

imposition of onerous regulatory obligations would unnecessarily shackle a new and growing industry at the starting gate without offering any countervailing public benefits.

Substantial efforts are underway in the industry to create an effective means for implementing the DBS public service obligations imposed by Congress. TEMPO supports an industry-wide solution and looks forward to working with other DBS providers to create a consensus approach toward maximizing service benefits while minimizing unwarranted regulatory burdens. The Commission should be supportive of this cooperative solution and allow sufficient flexibility in adopting its rules so that these efforts can go forward.

As an emerging DBS provider with limited capacity, moreover, TEMPO urges the Commission to adopt rules that not only provide needed flexibility, but also do not impose regulatory burdens that unfairly inhibit the ability of smaller operators to compete effectively. A regulatory model that facilitates the introduction of new public interest services while minimizing the impact on smaller systems would further the Commission's goal of promoting robust competition and maximizing consumer benefits.

II. GIVEN THE EARLY STAGE OF DBS OPERATIONS, THE COMMISSION SHOULD ADOPT A FLEXIBLE MODEL FOR THE NONCOMMERCIAL EDUCATIONAL AND INFORMATIONAL PROGRAMMING OBLIGATIONS OF THE ACT

The Commission has long recognized that competition and public service objectives are best promoted by avoiding regulation that could inhibit the growth and development of DBS service. Thus, TEMPO submits that the Commission should continue its policy of imposing only the minimal regulation required to comply with statutory mandates. In addition, the Commission should foster the development and distribution of diverse programming by

broadly construing the types and sources of programming that satisfy objectives and affording operators flexibility to maximize program exposure.

A. Reservation of Four Percent of a DBS Provider's Video Channel Capacity Would Fulfill the Congressional Mandate of Promoting the Distribution of Non-Commercial Educational and Informational Programming and Would Avoid Imposing Undue Burdens on the Still Evolving High Power DBS Industry

Section 25(b) of the 1992 Cable Act directs the Commission to adopt rules requiring a DBS video provider to "reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature."[3] The FCC requested comment on the amount of capacity to be reserved, what programming should qualify for the set-aside, and the applicable rates for programming provided pursuant to this statutory scheme.

TEMPO submits that the public interest objectives of the statute would be best served by requiring DBS providers, especially those such as TEMPO with limited capacity, to reserve no more than four percent of their video capacity for noncommercial educational and informational programming.[4] In adopting new rules, the FCC should take into consideration that DBS is still a young, evolving industry.[5] Thus, although a few DBS services have

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[3] 47 U.S.C. § 335(b)(1).

[4] See also Comments of United States Satellite Broadcasting Company, Inc., MM Docket 93-25, at 8-9 (filed May 24, 1993) ("USSB"); comments of PRIMESTAR Partners L.P., MM Docket No. 93-25, at 14 (filed May 24, 1993) ("PRIMESTAR").

[5] See, e.g., NPRM, 8 FCC Rcd at 1597. Notably, in adopting rules for the digital audio radio service ("DARS"), the Commission refrained from adopting a 4-7% set-aside for noncommercial educational and informational programming at this time. Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz

(Continued...)

commenced recently, the competitive landscape for DBS is still undeveloped, and DBS providers need the flexibility to respond quickly to shifting consumer demands. Indeed, a larger set-aside would disserve the public interest by inhibiting the ability of smaller DBS providers to respond to the needs of the subscribers or develop new services. A robust DBS industry is critical to ensuring that consumers can, now and in the future, receive the public benefits intended by Congress.

In addition, more onerous burdens on TEMPO and other small systems could hinder their ability to compete in the marketplace.[6] In determining the amount of capacity to be utilized for noncommercial educational and informational programming, Congress intended that "the Commission consider the total channel capacity of a DBS system."[7] Indeed, the Commission's allocation of DBS spectrum and ensuing and proposed mergers have left a wide disparity in the capacity of different DBS proponents. For example, DIRECTV provides service from 27 DBS channels capable of providing service to the entire continental United States ("full CONUS"), and EchoStar and News Corp. have proposed a combined entity that would control 50 full-CONUS channels. In contrast, TEMPO has been allocated 11 full-

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(...Continued)
Frequency Band, IB Docket No. 95-91, FCC 97-70, ¶ 92 (rel. March 3, 1997).

[6] TEMPO also agrees with PRIMESTAR that "[t]he burdensome nature of the statute's 50 percent limit on recovery of direct costs is another reason for the Commission to exercise its discretion to place the channel reservation requirement at the lower end of the statutory range of four to seven percent of channel capacity," at least for DBS providers with limited capacity. PRIMESTAR at 15.

[7] See NPRM, 8 FCC Rcd at 1596 (citing House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862, at 99 (1992); House Committee on Energy and Commerce, H.R. Rep. No. 102-628, at 124 (1992)).

CONUS channels, and USSB controls eight (five of which are currently in operation). Given the market realities that consumers expect a core of channels, imposition of a set-aside higher than the statutory minimum could have a disparate effect on small DBS operators and adversely affect their ability to compete with those operating with almost five times as many transponders.

To calculate the amount of actual capacity to be set aside for each DBS provider, the Commission should assess the number of unduplicated full-motion video program services offered by such operator on a date certain. This amount could be reassessed thereafter every two years. In establishing the set-aside, Congress directed the Commission to consider "the availability of or use by a DBS operator of compression technologies."[8] Digital compression of video programming, however, is very dynamic. Thus, the number of video program services will change throughout the year, and even day by day, depending on the type of programming and the actual compression ratio used at the time. By basing the set-aside amount on actual program offerings on a particular date, and updating it every two years, the rule would accommodate fluctuations in the amount of video program services over time and reasonably reflect advancements in compression technologies. The rule also would afford DBS providers a reasonable period of time to adjust to technological and marketplace changes and make appropriate adjustments to channel and program line-ups. In addition, this proposal would promote certainty to operators undertaking new regulatory obligations and provide for ease of administration and monitoring.

[8] NPRM, 8 FCC Rcd at 1596 (quoting House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862, at 99 (1992)).

TEMPO also submits that, pursuant to Section 25(b), the set-aside requirement is based only upon video programming offered by the DBS provider. Congress explicitly stated that this obligation applies only to a "direct broadcast satellite service providing *video* programming . . . ."[9] Accordingly, the Commission should make it clear that it will use only the number of actual unduplicated full-motion video programming channels provided to a consumer (excluding, for example, program guide services, audio or data services, barker channels, and channels used for administrative services) as the basis for determining the amount of capacity a DBS provider is required to reserve pursuant to its statutory obligations.

Furthermore, TEMPO supports the Commission's proposal to use a sliding scale to determine the amount of video channel capacity to be set aside. For example, for systems with 25 to 49 video channels, the DBS provider should be required to set aside the equivalent capacity of 1 channel; for systems with 50-74 video channels, the equivalent capacity of 2 channels; and so forth.[10] This simple approach provides certainty for the DBS provider, and gives the company flexibility to enter into programming arrangements that would be beneficial to its consumers.

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[9] 47 U.S.C. § 335(b)(1) (emphasis added).

[10] See Comments of the Satellite Broadcasting and Communications Association of America, MM Docket No. 93-25, at 11 (filed May 24, 1993) ("SBCA"); PRIMESTAR at 16.

B. Flexibility in the Placement of Noncommercial Educational and Informational Programming Will Ensure that Such Programs are Aired in a Manner that Maximizes Their Appeal and Exposure to Receptive Audiences

TEMPO agrees with commenters in the initial round that DBS providers should not be required to dedicate specific channels to provide qualifying noncommercial programming. A more flexible approach would encourage programmers of all types to produce quality noncommercial educational programming that would be promoted and marketed in a manner that maximized its exposure. Accordingly, DBS operators should have the flexibility to carry qualifying noncommercial educational and informational programming on channels that contain other programs as well.[11] For example, a DBS operator could count a specific block of noncommercial educational programming toward its set-aside even though the remainder of that particular channel or program service may not qualify.[12] To accommodate this desirable flexibility, the Commission should define a specific annual hour requirement by multiplying the number of channel equivalents to be set-aside by 24 hours per day by 365 days a year. Thus, if a DBS provider is required to set aside the capacity of 4 channels, it would be required to make available 35,040 hours annually for noncommercial educational and informational programming.

TEMPO believes that this approach would foster the development of additional high quality noncommercial educational shows by experienced programmers and increase the

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[11] See USSB at 9; PRIMESTAR at 16; Comments of DIRECTV, Inc., MM Docket. No. 93-25, at 19 (filed May 24, 1993) ("DIRECTV"); Comments of Discovery Communications, Inc., MM Docket No. 93-25, at 9 (filed May 24, 1993) ("Discovery").

[12] See Discovery at 9.

availability of such programming to a wider audience. As DIRECTV noted, "[a] cumulative hour measurement will allow . . . a DBS provider to program dayparts in a manner which maximizes the appeal and availability of different types of public service programming to target audiences," thereby "maximiz[ing] the programming's exposure to a receptive audience."[13] In short, a cumulative hour approach promotes creative and consumer-responsive packaging of program services.

C. The Commission Should Ensure that New DBS Providers Are Subject to the Same Obligations as Incumbent Services

The Commission has asked whether DBS providers which are currently offering service pursuant to executed contracts should "be subject to these reservation requirements only upon expansion of their service to include additional channels."[14] To ensure competitive equity, TEMPO submits that the set-aside obligation that should go into effect at the same time for all DBS providers, even if a particular provider has not yet executed program contracts. Otherwise, new entrants could potentially be subjected to the set-aside requirement before existing DBS operators, which could further hinder the ability of newcomers to compete against established operators.

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[13] DIRECTV at 20.

[14] NPRM, 8 FCC Rcd at 1597.

D. To Maximize Diversity and Promote the Creation of New Educational and Informational Programming, the Commission Should Broadly Construe the Classes of Programmers and the Types of Programming a DBS Operator May Rely Upon to Fulfill its Statutory Obligation

Pursuant to Section 25(b), a DBS provider must make reserved capacity available to "national educational programming suppliers," which are defined to "include[] any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."[15] In the NPRM, the Commission expressed its view that it "would encompass not only public television licensees but also entities such as the Public Broadcasting Service which disseminate programming on a national basis."[16] The Commission also asked whether it should define the term "noncommercial educational and informational programming."[17] TEMPO submits that broad construction of these terms would provide significant public benefits by fostering the development, production, and distribution of the widest variety of beneficial programming.

As an initial matter, Section 25 does not specifically define "national educational program supplier." Rather, the statute provides illustrative examples of certain qualifying entities. The Commission therefore can interpret the statutory language in a manner that best furthers the intent of Congress. In that regard, not limiting qualifying programmers to a particular class of providers would encourage the entire programming industry to create a diverse mix of high quality noncommercial educational and informational programming.

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[15] 47 U.S.C. § 335(b)(3), (5)(B).

[16] NPRM, 8 FCC Rcd at 1597.

[17] Id. at 1598.

Opening the door to a variety of program producers also would promote competition among program providers, thereby improving the caliber and abundance of differentiated program sources.[18] Accordingly, a liberal construction of qualifying programmers would best promote the Congressional objective of enhancing the educational and informational programming that is available to DBS subscribers.

TEMPO also agrees with the initial comments submitted in this proceeding that the definition of qualified programming should be flexibly construed.[19] A broad construction would promote the greatest diversity of noncommercial educational and informational programming for the benefit of the public. For example, program services offered by PBS, C-SPAN I and C-SPAN II provide excellent material of an educational or informational nature. By avoiding a narrow definition of qualified programming, the Commission would allow the marketplace to respond with other new and creative program services.[20] A flexible rule also

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[18] Moreover, the Commission should not exclude programming provided by an affiliate of the DBS operator from counting toward the set-aside. In particular, if other DBS providers are relying (or are able to rely) on such bona fide programming to satisfy their statutory obligations, an affiliated DBS provider should not be precluded from also airing this programming to satisfy its commitment. As PRIMESTAR noted in its initial reply comments, "Congress certainly knew how to address such concerns in the 1992 Cable Act, but chose not to bar any promising source of bona fide educational and informational programming." Reply Comments of PRIMESTAR Partners L.P., MM Docket No. 93-25, at 12 (filed Jul. 14, 1993) ("PRIMESTAR Reply").

[19] See USSB at 10-11; SBCA at 20-21; PRIMESTAR at 20-21; DIRECTV at 22; Comments of Continental Satellite Corporation, MM Docket No. 93-25, at 37 (filed May 4, 1993) ("Continental").

[20] See NPRM, 8 FCC Rcd at 1598.

would allow DBS operators to respond more fully to consumer demands for innovative educational and informational programming.[21]

Moreover, TEMPO agrees with the commenters in the initial round that DBS providers must have the reasonable discretion to select the particular program services carried in satisfaction of the set-aside.[22] This would promote competition among program providers to create a wide diversity of products. DBS operators also would be encouraged to differentiate program offerings to consumers and creatively market those services to maximize program exposure. Thus, flexibility would further the development of quality noncommercial educational and informational programming, regardless of its source.[23]

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[21] As USSB expressed in its initial comments, "[i]t would be better to provide latitude for a DBS provider to react to a changing program environment and to be unrestricted in determining how best to fulfill its obligations as long as the DBS provider's decisions are reasonable." USSB at 12. SBCA agreed that "[t]he choice of these program services must be left to the discretion of the DBS provider in order to meet consumer needs while at the same time fulfilling the public service obligations of Section 25." SBCA at 21.

[22] See SBCA at 21.

[23] This approach would be fully consistent with Congress' desire to limit a DBS provider's editorial control over the noncommercial educational and informational programming provided pursuant to Section 25. A DBS provider's decision to provide access to a particular *programmer* is fully content neutral with respect to the *program*. See, e.g., Turner Broadcasting System, Inc. v. FCC, No. 95-992, 1997 U.S. LEXIS 2078 (Mar. 31, 1997) (The Supreme Court concluded that the must-carry rules, which allow a cable operator to "have discretion in choosing" id. at *64, which local broadcast stations it will carry if the number of local stations desiring carriage exceeds one-third of the system's capacity, are "content-neutral," id. at *11, and constitutional.); see also 47 C.F.R. § 76.56(b)(4) (1996). Pursuant to Section 25 of the 1992 Cable Act, a DBS provider simply may not exercise editorial control over the content of such programming. Accordingly, TEMPO also supports the Commission's conclusion that because a DBS provider may not edit or censor the programming provided pursuant to these rules, the responsibility for any harm it may cause, such as defamation, remains with the programmer. See NPRM, 8 FCC Rcd at 1597; see also SBCA at 18; PRIMESTAR at 18; DIRECTV at 21.

E. The Commission Should Promote the Continued Development of the DBS Industry by Limiting the Economic Burden on Providers While Ensuring that Congressional Mandates Are Satisfied

Section 25 requires that channel capacity acquired by a programmer to distribute programming provided in satisfaction of the set-aside must be made available on "reasonable prices, terms, and conditions," which shall not exceed "50 percent of the total direct costs of making such channel available."[24] In calculating direct costs, Congress directed the Commission to exclude "marketing costs, general administrative costs, and similar overhead costs" and "the revenue that [the DBS] provider might have obtained by making such channel available to a commercial provider of video programming."[25] Congress also required that in determining what rates are reasonable, "the Commission shall take into account the non-profit character of the programming provider and any Federal funds used to support such programming."[26] TEMPO submits that, for providers paying for capacity to distribute programming pursuant to the set-aside, the Commission should set the benchmark for reasonable rates at the maximum permissible 50 percent of direct costs and narrowly construe excluded expenditures. This construction would further the statutory mandate without jeopardizing the continued growth and development of DBS.

The Commission has recognized that DBS is still a "fledgling industry."[27] Further, the launch of a new DBS enterprise necessitates extremely large upfront investments. The health

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[24] 47 U.S.C. § 335(b)(3), (4)(B).

[25] 47 U.S.C. § 335(b)(4)(C).

[26] 47 U.S.C. § 335(b)(4)(A).

[27] NPRM, 8 FCC Rcd at 1596.

of the industry should not be prematurely threatened by inhibiting a DBS provider's ability to recoup its initial expenditures. Indeed, setting the allowable rate of recovery any lower than the statutorily permissible 50 percent of a provider's direct costs could have a significant detrimental impact on the development of new services and unfairly hinder the ability of systems with limited capacity to compete.[28]

Setting reasonable costs at a level lower than 50 percent would also have a disproportionate impact on operators with limited capacity. For example, satellite systems, regardless of the number of transponders they are authorized to use, may have similar sunk costs. However, larger systems can amortize over more channels the losses incurred by providing capacity below cost. Thus, the Commission should limit the potential adverse impact on smaller carriers by allowing such providers to recover the maximum amount permitted by the Act.

The Commission also should not exclude from allowable direct costs any expenditures not specifically prohibited by Section 25: marketing and administrative costs and lost revenue.

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[28] See also SBCA at 22 (the DBS provider must generate "sufficient revenue to pay for the capital costs of the satellite project over time" and "be competitive against other technologies in the video market place.") DBS providers, moreover, should not be discouraged from carrying noncommercial programming in excess of its statutory requirements. Accordingly, the 50 percent rate should apply only to programmers paying for capacity to distribute services in satisfaction of the DBS provider's set-aside obligations.

TEMPO also submits that qualified program services acquired by the DBS provider through other financial arrangements (i.e., other than programmers payment of this 50 percent carnage rate) if mutually agreed to by the parties should count toward the programming set-aside. While the statute makes clear that a DBS provider cannot charge more than 50 percent of its direct costs to a programmer paying for capacity, the Commission should confirm that DBS operators may at their option pay a program supplier for use of its programming. See NPRM, 8 FCC Rcd at 1598-99; see also SBCA at 24-25; PRIMESTAR at 21; DIRECTV at 26-27.

Similarly, the Commission should not mandate further discounts on the basis of a particular programming provider's status. Such an approach would reasonably balance the requirement to distribute educational and informational programming and the benefits that flow from avoiding undue burdens on DBS providers.

III. POLITICAL ADVERTISING RULES AND POLICIES SHOULD BE CAREFULLY TAILORED TO RECOGNIZE THE NATIONAL AND MULTI-CHANNEL ATTRIBUTES OF DBS SERVICE

In the NPRM, the Commission recognized that DBS is a unique service. Indeed, unlike any other medium subject to political advertising rules, DBS has been designed, and currently operates, as a national and not a local program delivery service. Accordingly, the Commission should carefully tailor the reasonable access and equal opportunities provisions of Section 25 to account for the differences between traditional broadcast stations and cable systems, for which existing political advertising rules and policies were created, and the new national multichannel service of DBS.[29]

A. The Commission Should Follow Its Historical Policy of Relying on the Good Faith Judgments of Licensees to Provide Qualified Federal Candidates with Reasonable Access

TEMPO agrees with the Commission that it should apply its "long-standing policy" of relying upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates and determining compliance on a case-by-case basis.[30] As the NPRM recognized, however, reasonable access to DBS will differ significantly from access to

[29] See NPRM, 8 FCC Rcd at 1593.

[30] NPRM, FCC Rcd at 1593-94; see also DIRECTV at 13; Discovery at 5.

traditional local broadcast stations and cable systems. Accordingly, the right to reasonable access should be modified to conform to the unique nature of DBS service.

Existing DBS services are operated exclusively on a nationwide basis. Access rules therefore should apply only to candidates for the offices of the President and Vice President. Imposing access obligations on DBS operators' nationwide service for the benefit of candidates for the U.S. Senate and the House of Representatives would be impracticable and unduly burdensome.[31] To the extent, moreover, that certain DBS providers may carry local broadcast signals in the future, such stations already are subject to reasonable access and equal opportunity requirements for local federal elections.[32]

DBS providers should not be required to make all video channels under its control available to federal candidates. This would be consistent with the approach taken by the Commission in imposing equal opportunity requirements on cable systems.[33] As PRIMESTAR pointed out, "DBS providers should be free to organize their political programming in a way

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[31] In the NPRM, the Commission recognized that "[p]airing nation wide access with national candidates . . . has some precedent." . . .[I]n its application of the reasonable access provisions in the context of national networks, the Commission has accepted that a request for time need not be honored unless the presidential candidate involved is qualified nationwide." 8 FCC Rcd at 1594 n. 27 (citing Carter-Mondale Presidential Committee, 74 FCC 2d 628 (1979)).

[32] See NPRM, 8 FCC Rcd at 1593 n.21.

[33] See id.; see also DIRECTV at 14; PRIMESTAR at 11; SBCA at 14; Continental at 26; Reply Comments of Viacom International, Inc., MM Docket No. 93-25, at 17-18 (filed Jul. 14, 1993) ("Viacom Reply"). Accordingly, as commenters previously expressed, TEMPO believes that advertisement-free channels should be exempt from the requirements to carry political advertisements. See Continental at 26; SBCA at 12-13; Viacom at 19.

that they reasonably believe will be most attractive to viewers while remaining consistent with the basic requirements of Section 312(a)(7) and 315 of the Communications Act."[34]

In addition, DBS service consists primarily of services provided by third-party programmers. DBS operators therefore will be severely constrained in making specific programs or dayparts available to political candidates. Operators should have the flexibility reasonably to accommodate the access obligations by designating one or more channels for use by qualified national candidates. DBS providers similarly should not be required to provide candidates access to all program services.[35] Flexibility grants qualified candidates reasonable access to DBS subscribers while affording DBS providers the ability to tailor program offerings under their control to meet consumer needs.[36]

B. The Commission Should Tailor the Equal Opportunity Rules and Policies Applicable to Cable to Account for the National Multichannel Nature of DBS Service

As noted in the NPRM, a broadcast licensee that permits any legally qualified candidate to use its station must afford equal opportunities to all other qualifying opposing candidates in the use of the station. In applying these rules to DBS providers, TEMPO submits that the Commission should follow the model it has applied to cable operators.[37] As the Commission noted, it "has never required cable systems to air opposing candidates advertisements on the

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[34] PRIMESTAR at 12-13.

[35] See DIRECTV at 14; see also SBCA at 12.

[36] See Discovery at 6.

[37] See also PRIMESTAR at 12; USSB at 7; Viacom Reply at 18; Discovery at 6.